

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEROME L. KNIGHT,

Defendant-Appellant.

UNPUBLISHED

October 15, 2002

No. 231845

Wayne Circuit Court

LC No. 99-002073

Before: Murphy, P.J., and Markey and R. S. Gribbs*, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree murder, MCL 750.316, and sentenced to life imprisonment. He appeals as of right. We affirm.

Defendant was tried jointly with codefendant Gregory M. Rice. The prosecutor's theory was that defendant "bonded" codefendant Rice out of jail in exchange for Rice killing defendant's former girlfriend, Yahnica Hill.

On appeal, defendant raises three challenges involving the admission of allegedly hearsay evidence. First, defendant argues that witness Rodney Coleman's testimony that codefendant Rice had stated that he killed a girl on the east side was improperly admitted against defendant. Defendant did not object to the challenged testimony at trial. Although defendant filed a pretrial document concurring in all "motions filed" by codefendant Rice, we do not view this document as encompassing objectionable matters at trial. A defendant must make a specific objection on the particular grounds urged on appeal in order to preserve an issue at trial. *People v Cain*, 238 Mich App 95, 115; 605 NW2d 28 (1999). Defendant did not do so here. Accordingly, we conclude that this issue is not preserved. Where an issue is unpreserved, it is reviewed for plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Coy*, 243 Mich App 283, 287; 620 NW2d 888 (2000).

The prosecutor implicitly concedes that it was plain error to permit evidence of codefendant Rice's statement to be used against defendant. Nonetheless, reversal is not appropriate under the plain error rule unless the defendant is actually innocent or the error

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Carines, supra*. After an exhaustive review of the record, it cannot be said that defendant is actually innocent or that the error affected the fairness of the trial; therefore, we find no basis for reversal under the plain error rule.

Defendant also argues that the testimony of witness Stephanie Harris was improperly admitted. This issue was preserved by defendant's objection at trial.

We review a trial court's decision to admit evidence for an abuse of discretion. *People v Jones*, 240 Mich App 704, 706; 613 NW2d 411 (2000). There is no merit to defendant's claim that Harris' testimony, that she spoke to people as a result of Coleman's statement, was hearsay. Harris did not repeat the content of Coleman's statement. Moreover, Harris' testimony that she took certain actions as a result of what Coleman told her was introduced to show how the investigation proceeded, not to prove the truth of Coleman's statement. Thus, the testimony was not hearsay. MRE 801(c). We find no error.

Defendant also challenges the testimony of Coleman's girlfriend, Marlynda Mattison, who stated that she learned from Coleman that codefendant Rice had admitted to Coleman that he killed the victim. Although this double-hearsay evidence may have been improper, the error cannot be attributed to the prosecutor because it was first elicited by counsel for codefendant Rice and was not objected to by either defendant. Invited errors occasioned by defense tactics may not, on appeal, be assigned as grounds for reversal. *People v Bates*, 91 Mich App 506, 516; 283 NW2d 785 (1979).

Next, defendant argues that it was improper for the prosecutor to raise the issue of codefendant Rice's poverty. Evidence of poverty in general is not admissible to show motive or as evidence of credibility. *People v Conte*, 152 Mich App 8, 14; 391 NW2d 763 (1986). The evidence is admissible, however, to rebut the defendant's theory of the case. *Id.* Here, it was the prosecution's theory that defendant paid codefendant Rice to kill the victim and, in support of that theory, provided evidence that defendant bonded codefendant Rice out of jail. Both defendant and codefendant Rice testified that Rice had money hidden in his car, and that defendant used codefendant Rice's own money to bond him out of jail. The evidence of codefendant Rice's poverty was admissible to rebut this defense contention. *People Henderson*, 408 Mich 56, 66-68; 289 NW2d 376 (1980); *People v Jensen*, 162 Mich App 171, 179; 412 NW2d 681 (1987).

Defendant also argues that the evidence was insufficient to support his conviction. This Court reviews the evidence de novo in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979); *People v Oliver*, 242 Mich App 92, 94-95; 617 NW2d 721 (2000). The standard of review is deferential, and this Court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

To convict a defendant of murder on an aiding and abetting theory, the prosecutor must establish that (1) a crime was committed by either the defendant or another, (2) the defendant

performed acts or gave encouragement that aided or assisted in the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid or encouragement. *Carines, supra* at 768.

Here, Rodney Coleman's girlfriend, Marlynda Mattison, testified that she learned from Coleman that codefendant Rice had admitted killing the victim to Rodney Coleman. Even if not otherwise admissible, Mattison's testimony was elicited by the defense and admitted without objection, and may be considered by this Court as part of the evidence in this case. *People v Maciejewski*, 68 Mich App 1, 3; 241 NW2d 736 (1976).

There was also evidence that defendant and the victim had a contentious relationship, that defendant threatened to kill the victim, and that he was willing to pay to have her killed. The evidence also indicated that the victim was planning to testify against defendant in another case. Defendant asked Coleman "to do a girl for him for a G," "meaning as in kill her" for a thousand dollars, because "there was a girl testifying against him on a certain case, and that's why he wanted her done." Finally, there was evidence that defendant paid the bond money to get codefendant Rice out of jail. The evidence and reasonable inferences in this case were sufficient to support the jury verdict.

Defendant also challenges as discriminatory the prosecutor's peremptory challenges of six prospective jurors. A trial court's ruling under *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986), is reviewed for an abuse of discretion. *People v Howard*, 226 Mich App 528, 534; 575 NW2d 16 (1997). "In evaluating the race neutrality of an attorney's explanation, a court must determine whether, assuming the proffered reasons for the peremptory challenges are true, the challenges violate the Equal Protection Clause as a matter of law." *Hernandez v New York*, 500 US 352, 359; 111 S Ct 1859; 114 L Ed 2d 395 (1991). Here, defendant first objected to the prosecutor's exclusion of "black jurors from this particular jury; specifically black men." The trial court found that defendant had not shown a prima facie case of a pattern of discrimination. Moreover, the reasons given for the dismissal of the jurors—a serious felony conviction, a working relationship with people in the criminal justice system, and a bad experience with the criminal justice system—were race-neutral. The trial court did not abuse its discretion in finding no pattern of discrimination. *Howard, supra*.

Defendant later objected again to the prosecutor's peremptory challenges, particularly to the dismissal of prospective juror No. 2, an African-American female. Without the trial court's determination that there was a pattern of discrimination, the prosecutor gave her reasons for dismissing juror No. 2 and two additional black female prospective jurors. Once a prosecutor offers a race-neutral reason for peremptory challenges, and the trial court makes a ruling on the question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot. *Hernandez, supra*. The prosecutor's burden of providing a race-neutral reason for exercising a peremptory challenge does not rise to the level of requiring the prosecutor to justify the exercise of a challenge for cause. *Howard, supra* at 535.

Here, two of the prospective jurors were dismissed because they had close relatives who had been convicted of serious crimes. We are not persuaded by defendant's argument that dismissing prospective jurors because they have relatives in the criminal justice system is, "on its face," a race-based reason. Indeed, this Court has previously found that dismissal because a

relative has been convicted of a serious crime is a race-neutral reason. *Id.* The remaining prospective juror, juror No. 2, had a daughter the same age as the victim and expressed “hope” that she would not compare the victim with her own child. Even assuming that defendant presented a prima facie showing of discrimination, the prosecutor provided race-neutral reasons for its peremptory challenges. The trial court did not abuse its discretion in rejecting this claim.

Nor is reversal required because of the jury selection process. Defendant did not object to the jury selection process and, in fact, expressed satisfaction with the jury. Defendant has not demonstrated prejudice or shown how his substantial rights were affected. Accordingly, this unpreserved issue does not warrant appellate relief.

Defendant challenges testimony regarding an incident when he allegedly beat the victim. The subject first came up during defendant’s cross-examination of the victim’s friend. Because the issue was introduced by the defense, defendant cannot now complain that he was not given notice that the subject would be presented. *Bates, supra* at 506. Further, even assuming that the evidence should have been excluded, it was undisputed that defendant and the victim had a stormy relationship and there were allegations of bad behavior on both sides. We find no plain error affecting defendant’s substantial rights.

Defendant also argues that he was denied a fair trial because of the late endorsement of witness Edward Petty. The trial court’s decision to allow a late endorsement of a witness is reviewed for an abuse of discretion. *People v Gadomski*, 232 Mich App 24, 32-33; 592 NW2d 75 (1998). MCL 767.40a(4) permits the prosecutor’s late endorsement of a witness at any time upon leave of the court and for good cause shown. A violation of § 40a does not require automatic dismissal; rather, the trial court must exercise its discretion in fashioning a remedy for non-compliance with a discovery statute, rule, order or agreement. *People v Williams*, 188 Mich App 54, 58-59; 469 NW2d 4 (1991). Here, defendant was provided notice and the substance of the witness’ testimony a week before trial, the witness was present and available for defense counsel to interview him, and the trial court provided counsel with time to prepare. We find no abuse of discretion.

Defendant contends that he was denied a fair trial because the prosecutor elicited information that he did not make a statement. When a defendant exercises his right to remain silent, that silence cannot be used against him at trial. *People v Bobo*, 390 Mich 355, 361; 212 NW2d 190 (1973). The prosecutor concedes that admission of the evidence of defendant’s silence was plain error. However, because defendant did not object to the testimony below, reversal is not required unless the error affected defendant’s substantial rights. *Carines, supra* at 763; *People v Taylor*, 245 Mich App 293, 304; 628 NW2d 55 (2001). An error may be harmless beyond a reasonable doubt when it does not reveal any new information regarding the defendant’s guilt or innocence. *Id.* Here, the officer’s testimony regarding defendant’s silence was unsolicited and provided no unique information regarding defendant’s guilt or innocence. Accordingly, defendant’s substantial rights were not affected. *Carines, supra*.

Defendant also argues that the prosecutor engaged in misconduct by eliciting testimony that defense witnesses visited him in jail. Prosecutorial misconduct issues are decided case by case. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). This Court considers the alleged misconduct in context to determine whether it denied the defendant a fair and

impartial trial. *People v Reid*, 233 Mich App 457, 466; 592 NW2d 767 (1999). We find no evidence, and defendant cites no testimony, where this alleged misconduct occurred. As the prosecutor suggests, it appears that defendant is challenging the direct-examination testimony of Officer Shaw that defendant was in jail. The trial court intervened sua sponte and stopped the questioning. Defendant did not object or request a cautionary instruction, despite the trial court's expressed willingness to give one. Because any perceived prejudice could have been cured by a timely instruction had one been requested, reversal is not warranted. *Schutte, supra* at 721.

Finally, defendant argues that the trial court erred in instructing the jury on aiding and abetting. The jury may be instructed on aiding and abetting where there is evidence that (1) more than one person was involved in committing a crime, and (2) the defendant's role in the crime may have been less than direct participation in the wrongdoing. *People v Bartlett*, 231 Mich App 139, 157; 585 NW2d 341 (1998). Here, as noted previously, Coleman's girlfriend, Marlynda Mattison, testified without objection that she learned from Coleman that codefendant Rice had admitted killing the victim. There was evidence that defendant and the victim had a contentious relationship. There was also evidence that defendant threatened to kill the victim and that he was willing to pay to have her killed. Defendant asked Coleman to kill "a girl" for him for a thousand dollars, because she was going to testify against him. The evidence also indicated that the victim was planning to testify against defendant in a case that was coming up. Finally, there was evidence that defendant paid the bond to get codefendant Rice out of jail. The evidence and reasonable inferences in this case were sufficient to allow a jury to decide that more than one person was involved and that defendant may have been less than a direct participant in the shooting. *Id.*

Affirmed.

/s/ William B. Murphy

/s/ Jane E. Markey

/s/ Roman S. Gribbs